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THE CORPORATION TRUST COMPANY AND ASSOCIATED COMPANIES

*In the incorporation, qualification and statutory representation of corporations, The Corporation Trust Company, C T Corporation System and associated companies deal with and act for lawyers exclusively.*

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## ***CORPORATION TRUST***

The Corporation Trust Company  
CT Corporation System  
And Associated Companies

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The Corporation Journal is published by The Corporation Trust Company, monthly, except in July, August, and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve The Journal in a permanent file, a special and very convenient form of binder will be furnished at cost (\$1.50).

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## **CORPORATION TRUST**

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## Some Outstanding 1943 State Legislation

### Income Taxes

Personal income taxes are no longer in effect in South Dakota and West Virginia as a result of 1943 enactments.<sup>1</sup>

A 15% reduction will be allowed in the amount otherwise payable as the California Bank and Corporation Franchise tax on income received in 1943 and 1944, under an act of the 1943 session.<sup>2</sup> A similar reduction obtains with respect to any tax due under the California Income Tax Act of 1937.<sup>3</sup>

A credit of 33½% against the Maryland income tax, applicable after the tax has been computed, first allowed in 1943, will continue in effect with respect to the tax payable in 1944 and 1945.<sup>4</sup>

The Pennsylvania Income Tax on corporations has been continued in effect for two additional years.<sup>5</sup>

Withholding of the Minnesota Personal Income Tax is now required, and the first quarterly returns and remittances will be made *on or before October 15, 1943*.<sup>6</sup>

Delaware has imposed a 1% War Emergency Gross Income Tax for two years upon the gross income of *natural persons* residing in Delaware or earning income regularly in that state.<sup>7</sup>

### Other Taxes

*October 1* was restored as the date in New Jersey as of which property is assessed annually.<sup>8</sup>

In Minnesota, moneys and credits have been exempted from property taxation for two years, 1943 and 1944.<sup>9</sup>

The Pennsylvania Mercantile License Tax will be abolished *as of January 1, 1944*, as a result of a 1943 Act.<sup>10</sup>

The following taxes have been extended so as to be effective through June 30, 1945: Colorado Service Tax, North Dakota Sales Tax and the Wisconsin Privilege Dividend Tax.<sup>11</sup> A temporary reduction from 3% to 2½% in the rate of the California Sales and Use Taxes will be in effect to June 30, 1945.<sup>12</sup>

In West Virginia, effective July 1, 1943, the annual exemption of \$25 in connection with the Business and Occupation (Gross Sales) Tax was increased to \$50. A reduction of 10%, also effective July 1, 1943, in the amount of taxes otherwise payable, may be taken for the first time in connection with the quarterly return and payment due *on or before October 30, 1943*.<sup>13</sup>

### Merger and Consolidation

Oregon in 1943 provided a procedure for the merger or consolidation of any two or more domestic corporations or of any domestic corporation or corporations and any foreign corporation or corporations, the resulting or new cor-

<sup>1</sup> South Dakota Ch. 295 and West Virginia H. B. 2. <sup>2</sup> Ch. 355. <sup>3</sup> Ch. 356. <sup>4</sup> Ch. 319. <sup>5</sup> Act No. 108. <sup>6</sup> Ch. 656, Sec. 20. <sup>7</sup> H. B. 22 and H. B. 187. <sup>8</sup> Ch. 120. <sup>9</sup> Ch. 656, Sec. 30. <sup>10</sup> Act No. 110. <sup>11</sup> Colorado H. B. 236, North Dakota Ch. 264 and Wisconsin A. B. 177. <sup>12</sup> Ch. 357. <sup>13</sup> S. B. 170.

poration being either a domestic corporation or a corporation of another state in which a constituent company is organized.<sup>14</sup> The following states substantially enlarged their existing provisions relative to merger and consolidation: Connecticut, Illinois, North Carolina, and Utah.<sup>15</sup> Delaware, New Jersey and New York effected, by comparison, minor amendments to their existing merger and consolidation provisions, while Vermont expanded existing statutory authority and procedure for the sale of entire corporate assets to cover merger and consolidation.<sup>16</sup>

#### Indemnification of Directors, etc.

The following states enacted provisions in 1943 under which directors, officers, etc., could obtain reimbursement, under conditions outlined, for expenses incurred in the defense of an action, etc., in which they are parties by reason of being such director, officer, etc.: California, Connecticut, Delaware, Maine and Montana.<sup>17</sup>

#### New Corporation Law

Missouri completely revised its Corporation Law in 1943.<sup>18</sup>

#### Enlargement of Corporate Powers

In New York, Ch. 600, L. 1943, *effective October 1, 1943*, in amending subdivision (E) of Section 36, Stock Corporation Law, authorizes a New York corporation to create, alter or abolish any provisions or rights in respect to (1) redemption of shares, (2) undeclared cumulative or noncumulative dividends, whether or not accrued, (3) any accumulated but unexpended instalment of any sinking fund, whether or not set aside for redemption or purchase of any shares, or (4) any preemptive right to subscribe, whether existing at law or contained in the certificate of incorporation.

#### New Annual Report

South Dakota corporations will be required to file an Annual Report for the first time with the Secretary of State *between May 1 and June 1, 1944*, under a 1943 law.<sup>19</sup>

#### Uniform Acts Adopted

The Uniform Stock Transfer Act was adopted in 1943 by Arizona, Florida, Maine, Missouri, Montana, New Mexico, North Dakota and Texas,<sup>20</sup> while the Uniform Acknowledgment Act was enacted by Arizona, Arkansas, New Hampshire and Wisconsin.<sup>21</sup>

<sup>14</sup> Ch. 366. <sup>15</sup> Connecticut Ch. 6, Illinois H. B. 779, North Carolina Ch. 270 and Utah Ch. 27. <sup>16</sup> Delaware Sen. Sub. for S. B. 107, New Jersey Ch. 170, New York Ch. 467 and Ch. 468 and Vermont S. B. 43. <sup>17</sup> California Ch. 934, Connecticut Ch. 293, Delaware Sen. Sub. for S. B. 107, Maine Ch. 46 and Montana Ch. 84. <sup>18</sup> "The General and Business Corporation Act." H. B. No. 64. <sup>19</sup> Ch. 21. <sup>20</sup> Arizona S. B. 70, Florida H. B. 366, Maine Ch. 266, Missouri H. B. 309, Montana Ch. 115, New Mexico Ch. 67, North Dakota Ch. 102 and Texas S. B. 200. <sup>21</sup> Arizona Ch. 80, Arkansas H. B. 322, New Hampshire H. B. 293 and Wisconsin Ch. 289.

## Domestic Corporations

### Delaware.

California Court of Appeals rules preferred stockholder of Delaware company not entitled to recovery because guilty of laches where first indication of dissent was given after consummation of plan of consolidation. Where a stockholder in a Delaware company received proper notice of a proposed consolidation with a Pennsylvania corporation, but took no action indicating dissatisfaction with the plan until a month after the consolidation was approved, and commenced suit five months later, the United States Circuit Court of Appeals, Ninth District, reversed a judgment in favor of the stockholder, concluding that "the indicia of laches and estoppel—silence, inaction, the failure to exercise ordinary care, dilatory conduct, changes of position, and intervention of rights—are 'plainly indicated'." *The National Supply Company v. Leland Stanford Junior University et al.*, 134 F. 2d 689. Commerce Clearing House Court Decisions Requisition No. 300554.

Federal Circuit Court of Appeals affirms judgment of District Court following Delaware Supreme Court ruling upholding merger of Delaware parent and subsidiary corporations which involved extinguishing of accumulated dividends on parent's preferred stock. In *Hottenstein et al. v. York Ice Machinery Corporation*, 45 F. Supp. 436, (The Corporation Journal, October, 1942, page 223), the United States District Court, District of Delaware, followed the Delaware Supreme Court in upholding a merger of Delaware parent and subsidiary corporations which involved the extinguishing of accumulated dividends on the parent's preferred stock. Upon appeal, the United States Circuit Court of Appeals, Third Circuit, has affirmed the judgment of the District Court. In concluding its opinion, the Circuit Court of Appeals said: "A court of the United States bound by the rule of *Tompkins v. Erie R. Co.* is powerless to afford aid to the stockholder until reclassification reaches that degree of unfairness where it amounts to a cancellation of the preferred stockholders' accumulated unpaid dividends without adequate compensation therefor under the law, either by way of a share in the equity of the surviving corporation or by the payment of money under Section 61 of the General Corporation Law. At such a point a court of the United States might grant injunctive relief under the provisions of the Fourteenth Amendment. Such is not the situation in the case at bar, for as we have stated the plan is fair." *Hottenstein et al. v. York Ice Machinery Corporation*, United States Circuit Court of Appeals, Third Circuit, June 15, 1943. Commerce Clearing House Court Decisions Requisition No. 304756; 136 F. 2d 944. Richard J. Mackey of New York City, for appellant. Robert H. Richards of Wilmington, for appellee.

Preliminary injunction to enjoin consummation of proposed merger agreement denied where complainant failed to satisfy court of reasonable probability of ultimate success upon final hearing. Complainant, owner of two shares of preferred stock of defendant company, sought a preliminary injunction to prevent the consummation of a proposed

agreement of merger between defendant and a wholly owned subsidiary, both Delaware companies. No dividends had been paid on either the common or preferred stock of defendant since 1930 and unpaid accumulated dividends on the preferred stock aggregated \$1,839,156.67. At a meeting of defendant's stockholders, held April 14, 1943, after the agreement had been approved by the directors of defendant and of the merging subsidiary, the defendant's stockholders, both common and preferred, had voted overwhelmingly in favor of the merger. Complainant contended that the changes in capitalization provided by the proposed merger agreement were so unfair and inequitable to the preferred stockholders that the consummation of the merger should be enjoined. The Court of Chancery, Kent County, after an examination of the terms of the proposed merger, the financial condition of the defendant and surrounding circumstances, concluded that the facts advanced fell far short of demonstrating the unfairness of the plan and of overcoming the presumption that the judgment of the governing body of the corporation, whether at the time it consists of directors or majority stockholders, is formed in good faith and inspired by a *bona fides* of purpose, and that complainant had not satisfied the court that there is at least a reasonable probability of ultimate success upon a final hearing. The application for a preliminary injunction was, therefore, denied. *Porges v. Vadsco Sales Corporation*, 32A. 2d 148. Commerce Clearing House Court Decisions Requisition No. 303043. Max Terry of Dover and Abraham Marcus of New York, for complainant. Caleb R. Layton, 3rd, and Daniel O. Hastings of Hastings, Stockly and Layton of Wilmington and Joseph P. Antonow of Chicago, Illinois, for defendant.

Dissenting stockholder, failing to exchange stock under recapitalization plan, but accepting numerous dividends on new stock, denied recovery. In *Frank et al. v. Wilson & Co., Inc.*, 9 A. 2d 82, (The Corporation Journal, January, 1940, page 79), the Court of Chancery, New Castle County, ruled that a stockholder, dissenting to a recapitalization plan, who failed to exchange stock, upon which accrued dividends remained unpaid, for new common stock under the plan, but who accepted numerous dividends on the new stock, was to be denied recovery in a suit instituted almost three years after the adoption of the amendment effecting changes in the capital structure. Upon appeal, the Supreme Court of Delaware has sustained the decree of the Chancery Court. *Frank et al. v. Wilson & Co., Inc.*, 32 A. 2d 277. Commerce Clearing House Court Decisions Requisition No. 303354. William Frickett of Wilmington, for appellants. Aaron Finger of Richards, Layton & Finger, of Wilmington, for appellee.

#### Kentucky.

Directors, calling one class of stock for redemption, under charter provision, ruled without authority to change their mandatory redemption to one which was optional by a subsequent resolution, since rights of stockholders affected became vested upon original call. "The case," observed the Court of Appeals of Kentucky, "presents a novel question

of power of the board of directors of a corporation to rescind or modify its action in calling certain stock for redemption or retirement. The Axton-Fisher Tobacco Company, a Kentucky corporation, has or had three classes of stock, which are designated as Preferred, Class A Common and Class B Common. The preferred stock (13,698 shares outstanding) bears cumulative dividends at the rate of 6 per cent per annum. Class A Common stock (15,397 shares outstanding) bears cumulative dividends at the rate of \$3.20 per share per annum and has other substantial rights. Class B Common stock (142,080 shares outstanding) has the sole voting power in the management of the corporation except in the event of default in the payment of as many as four quarterly dividends on either of the other two classes. The Preferred stock has first right to dividends. It is not involved in the case. Class A Common stock has few of the attributes of ordinary common stock, it being of the nature of secondary preferred stock." "The articles of incorporation contain a provision that all or any part of the Class A Common stock, at the option of the directors, upon sixty days notice, may be redeemed on any quarterly dividend-payment date by the company paying \$60 a share therefor, and all accrued unpaid dividends. If less than all the stock be retired, all stockholders of the class must be treated alike. On April 30, 1943, the board of directors adopted a resolution reciting that pursuant to the above provision of the charter the entire outstanding Class A Common stock was called for redemption on July 1, 1943, at \$60 per share plus the accrued unpaid dividends thereon, including one payable July 1st, amounting to \$20.80 per share, an aggregate of \$80.80. A trust company was named as redemption agent and the officers of the corporation were authorized and directed to deposit \$1,244,077.60 with the trust company as a special fund with which to effectuate the redemption. On June 16, 1943, the directors adopted a resolution modifying their previous action and changing the call for the retirement of Class A Common stock from a mandatory to an optional one, leaving it to the option of the holders thereof whether they would surrender the stock for redemption on July 1st upon the same terms or would retain it without impairment of the rights appertaining thereto. A holder of a small amount of Class B Common stock instituted this suit for a declaratory judgment respecting the power and right of the directors to modify the action of April 30th. She denied such power. The circuit court declared it was a proper exercise of power." The Court of Appeals reversed the judgment of the circuit court, concluding that the status of stockholders of both Class A and B had changed and that what were potential rights in Class B stockholders became vested rights by the first action taken by the directors and that the rights of either class could not be impaired or modified without the stockholders' consent. *Taylor v. The Axton-Fisher Tobacco Co.*, 173 S. W. 2d 377. CCH Requisition No. 306871.

**Enforcement of Escheat Act of 1940 postponed pending appeal to the Supreme Court.** In *Anderson National Bank et al. v. Reeves*, decided December 18, 1942, affirmed on second appeal, June 15, 1943, the Kentucky Court of Appeals upheld the validity of the Kentucky Escheat

Act of 1940, as amended, and directed compliance with the Act, which had been suspended during the pendency of the appeal, at a time to be fixed by the Circuit Court of Franklin County. Information has been received that an appeal to the Supreme Court of the United States has been taken and that this will have the effect of further postponing the enforcement of the Act. (*Appeal filed in the Supreme Court of the United States, July 12, 1943; Docket No. 154.*)

### New Jersey.

Consummation of mandatory plan of reorganization, providing for elimination of unpaid arrears of cumulative dividends on preferred stock, restrained in suit instituted by non-assenting preferred stockholders. Complainant preferred stockholders sought to restrain defendant corporation from consummating a proposed plan of recapitalization. The company had stock of three classes: prior preferred, preferred and common, unpaid cumulative dividends being in arrears on the preferred stock. The plan, which had been approved by approximately eighty-two per cent. of the preferred and by one hundred per cent. of the prior preferred and common stock, provided for the elimination of the prior preferred, the reduction of the preferred stock from 10,000 to 4,000 shares, the 4,000 shares to be known thereafter as "first preferred," and of the common from 16,000 to 8,350 shares. The holders of the preferred stock were to receive four shares of the new first preferred for each ten shares of preferred stock held and to surrender their claim for cumulative dividends which were in arrears. The new preferred issue was to have the same dividend rate of five per cent. and to be entitled to elect the same proportion of directors as at present and this new stock would be a first lien on the earnings of the company and on its assets in the event of liquidation, dividends to be cumulative. The Court of Chancery ruled in favor of the complainant stockholders, observing: "The record of the company reveals that while the prior preferred dividends have been paid, the preferred stockholders have received only two partial dividends. These stockholders, therefore, now have a claim for accrued dividends. If, however, the proposed plan becomes effective they will lose that right. The present position of the complainants will be materially and adversely affected by the proposal to issue new shares in the ratio of four for ten." The court concluded that the complainants had made out a prima facie case showing that the proposed plan would deprive them of a very substantial right and remarked that the plan was mandatory and lacked an essential element of justice or equity. *Kamena et al. v. Janssen Dairy Corporation*, 31 A. 2d 200. Hollander & Leichter of Union City and Edward Stover of Hoboken, for complainant. Milton M. Unger of Newark, for intervenors. Julius Lichtenstein of Hoboken, for defendant.

### Utah.

Mailing of notice of special meeting to stockholders by corporation's secretary ruled personal service of notice. At a special meeting

of defendant corporation, its president was authorized to sell its ranch property. This action was brought to recover damages for breach of a contract resulting from the acceptance, by plaintiffs, of an option given by the president of the company to plaintiffs. Certain stockholders of defendant intervened, contending the special meeting mentioned was illegal because no legal, statutory notice was given to the interveners and that the president was without authority to enter into the contract upon which plaintiffs relied. The affidavit of defendant's secretary showed that a notice of the meeting had been mailed to each stockholder. It was conceded that the charter of the corporation did not provide how notice of a special stockholders' meeting was to be given. Sec. 18-2-41, R. S. Utah, 1933, contained provision that notice of a special meeting "shall be given by personal service of the notice upon each such stockholder at least five days before the date fixed for the meeting, or by advertisement in some newspaper published in the state." Sec. 104-43-2 provided that "the service may be personal by delivery to the party or attorney on whom service is required to be made," while Sec. 104-43-3 contained provision that "service by mail may be made when the person making the service and the person on whom it is to be made reside, or have their offices, in different places between which there is a regular communication by mail." Reading the latter two sections together, the United States Circuit Court of Appeals, Tenth Circuit, ruled that the notice of the special meeting of the stockholders was given by personal service of notice. The minutes of the meeting called in this manner indicated the president had been authorized to sell the property in question. However, he gave plaintiffs an option which plaintiffs exercised. The court ruled that while the option was not binding upon the company, because not authorized by it, nevertheless it was a continuing offer to sell which ripened into a binding contract when accepted by plaintiffs. A summary judgment in favor of the corporate defendant was reversed and the case was remanded with instructions to grant a new trial. *Merkion et al. v. Scorup-Somerville Cattle Co. et al.*, 134 F. 2d 473. S. J. Quinney (Robert L. Judd, Paul H. Ray and A. H. Nebeker, on the brief) of Salt Lake City, for appellants. Jesse R. S. Budge of Salt Lake City (Clarence T. Ward of Boise, Idaho, and Mitchell Melich of Moab, Utah, on the brief), for appellee Scorup-Somerville Cattle Co. Knox Patterson of Salt Lake City, for interveners. (*Petition for certiorari filed in the Supreme Court of the United States, April 23, 1943, Docket No. 951. Certiorari denied, June 1, 1943.*)

## Foreign Corporations

### Louisiana.

Unlicensed foreign trust company carrying on business in state comparable to that of a Louisiana banking institution, held doing business and denied right to sue. Plaintiff, a banking corporation domiciled in the Town of Proctor, State of Vermont, sued to recover on a note given by a resident of Louisiana. Defendant contended plaintiff was a

Installing the Corporation Trust system of statutory representation does not mean *adding* anything to what a company must do about the state taxes it must pay in the states in which qualified, state reports it must file, the office or agent it must maintain, and the other requirements it must observe. Installing the Corporation Trust system means simply to make use of an organized, integrated *system* for keeping track of what must be done and when.

#### **TAXES AND REPORTS**

The state taxes that a foreign corporation must pay and the reports it must file and the times they must be paid or filed differ radically among the different states. When a company is using the Corporation Trust system of representation its counsel is informed just how and when each report is to be filed and when and where each tax is to be paid. If forms are available, they are furnished, and if not, the information is furnished as to where and how they may be applied for.

In addition, the company's attorney is furnished with a unit of the Corporation Tax Service, State and Local, for each state in which his client is represented. This is a looseleaf service which gives the law, official regulations, court decisions, etc., for every tax for which a corporation is liable in the state.

#### **CHANGES AND NEW MATTERS**

Any new laws or amendments or new regulations or rulings or court decisions affecting a corporation's requirements in a state are reported immediately—the Corporation Trust system having unequalled facilities for keeping informed of such matters and for disseminating the information quickly.

#### **MAINTENANCE OF OFFICE AND AGENT**

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ration System or associated company has an office and representative for furnishing the statutory office or agent and address as may be required in each jurisdiction. It relieves the corporation and attorney of all worry over changes or absences of its statutory agents.

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Through its more than half a century of experience a system has been built up and developed through which the attorney for any company represented by C T may work out in advance any specific directions for the handling of each different type of process or communication, which directions are automatically followed without bother thereafter.

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The cost of organized C T Representation is actually less than fifteen cents per day per unit. It is possible only because our service is being rendered to the attorneys of many thousands of corporations and on a compact, systematized plan worked out from our half a century of experience.

We accept appointment as statutory representative from, and serve in that capacity for, attorneys only. We are, therefore, working always hand in hand with lawyers, suiting our ways to lawyers' methods and developing our service to comply with lawyers' requirements—the only safe course, we believe, for the corporation represented.

foreign corporation, doing local and intrastate business in the state and, under Sec. 1, Act No. 8, Third Extraordinary Session, 1935, could not maintain suit because it had not obtained authority to do business. The Court of Appeals of Louisiana noted that plaintiff had acquired about fifty notes of various persons in Louisiana which were secured by special mortgages on real estate in Louisiana and that through foreclosure proceedings it became the owner of about 15,000 acres of the mortgaged lands. For ten years plaintiff had an agent in Louisiana who managed and leased the land, negotiated sales, etc. "In short," said the court, "plaintiff's course of conduct in the state, with respect to its investments and property therein, was no different from that which a Louisiana banking institution would have done in like circumstances. It extended continuously over a period of more than ten (10) years and had not ceased when this suit was filed. The question arises: Do these various acts and the course of conduct over so many years on the part of plaintiff amount to 'doing business' in this state? We think so." A judgment in the lower court dismissing the suit was affirmed. *Proctor Trust Co. v. Pope*,\* 12 So. 2d 724. Camden K. Staples of Louisiana, for appellant. C. E. Laborde, Jr. of Marksville and James W. Hopkins of New Orleans, for appellee.

\* Excerpts from this opinion are printed in *The Corporation Tax Service*, Louisiana, page 522.

### Minnesota.

Unlicensed foreign corporation carrying on a customhouse brokerage business in Minnesota held "doing business" and denied right to sue in state court. Plaintiff foreign corporation entered Minnesota and opened an office for the carrying on of its customhouse brokerage business there by performing, for shippers of goods into the United States, for an agreed compensation, the service of making declarations to the customs officials at the port of entry of the contents and value of shipments and effecting payment of the prescribed tariff on dutiable items. The Minnesota Supreme Court reversed a judgment of the lower court holding that plaintiff was engaged in interstate or foreign commerce, ruling that such a broker was an independent contractor who performed a personal service for the shipper, who did not come into contact with the commerce in any way insofar as its actual movement was concerned. Plaintiff was, therefore, regarded as carrying on an intrastate activity and, not having obtained authority to do business in Minnesota under St. 1941, Sec. 303.20, it was held that defendant's motion to dismiss the action at the close of plaintiff's case should have been granted. *Union Brokerage Co. v. Jansen et al.*, Minnesota Supreme Court, May 14, 1943. Commerce Clearing House Court Decisions Requisition No. 303031.

### New Mexico.

Unlicensed foreign corporation permitted to maintain suit on contract executed in another state. After negotiations over a period of

several months, a written contract was prepared by the plaintiff corporation in New York and sent by mail to the defendant in New Mexico, where it was signed by him. All copies were then returned to the plaintiff in New York, where plaintiff signed and executed the contract, and mailed one copy to defendant in New Mexico. The Supreme Court of New Mexico ruled that the contract "must be considered as having been executed in New York," and indicated that the plaintiff company, not licensed in New Mexico, was not prohibited from maintaining suit on the contract by reason of the provisions of Sec. 32-207, Comp. 1929, which prevents a corporation transacting business in the state from maintaining an action in the state upon a contract made by it in New Mexico until it has obtained authority to do business in the state. *Transradio Press Service, Inc. v. Whitmore*,\* 137 P. 2d 309. E. E. Young of Roswell, for appellant. Frazier & Quantius of Roswell, for appellee.

\* The full text of this opinion is printed in *The Corporation Tax Service*, New Mexico, page 151.

### New York.

Complaint ordered dismissed in stockholder's action involving the internal affairs of a foreign corporation. The Court of Appeals has recently ruled that a motion to dismiss the complaint should be granted where stockholders of a North Carolina company instituted an action in a New York court against the corporation and others, grounded in fraud and deceit, under circumstances where the relief sought was that a preferred stock issue of the company be declared illegal, that certificates issued thereunder be declared void and be required to be surrendered and cancelled, that the corporation and its officers be enjoined from dealing with the stock and from declaring dividends thereon and that other relief be granted. The court observed: "A judgment of a court in this state granting the relief sought could not be enforced, nor could the plaintiff be granted complete relief without cancellation of recapitalization proceedings taken under the laws of a foreign state and of shares of stock issued thereunder, and consequent interference with the internal affairs and management of a foreign corporation. In those circumstances, jurisdiction by our courts will not be entertained." *Sternfeld v. Toxaway Tanning Company et al.*, 290 N. Y. 294, 45 N. E. 2d 145. CCH Requisition No. 301287. Joseph C. Slaughter, Charles H. Lieb and Morris Katz, of New York City, for appellants. Stanley Rosenthal and Maxwell Okun, of New York City, for respondent.

### Ohio.

Foreign corporation maintaining a local stock of goods, from which its Ohio customers were accommodated, held doing business so as to be required to be licensed. Plaintiff New York corporation, not licensed to do business in Ohio, maintained a complete stock of standard sizes of its manufactured product with an Ohio company, from which plaintiff's customers could be supplied on rush orders. Plaintiff sought to

recover for material furnished from this Ohio stock and for material sent from its New York factories. The defense was interposed that plaintiff was doing business in Ohio and was precluded from maintaining suit in the Ohio courts under Sec. 8625-25, G. C. The Court of Appeals of Franklin County concluded that plaintiff was doing business so as to be required to be licensed as a foreign corporation and ordered the petition of plaintiff dismissed. *Manhattan Terrazzo Brass Strip Co., Inc. v. A. Benzinger & Sons et al.*,\* Court of Appeals of Franklin County, January 15, 1943. Commerce Clearing House Court Decisions Requisition No. 307279. E. D. Howard and Angus Holmes of Columbus, for plaintiff-appellee. L. C. Barker and George A. McGrath of Columbus, for defendants-appellants. (*Rehearing denied, January 29, 1943.*)

\* The full text of this opinion is printed in *The Corporation Tax Service*, Ohio, page 301.

## Taxation

### Arkansas.

Arkansas gross receipts tax ruled not applicable where there was merely solicitation by traveling representatives followed by shipment in interstate commerce into state, no office being maintained in state. Appellee, a Tennessee corporation, not qualified to do business in Arkansas, had no sales office, branch, plant or other place of business in Arkansas. Orders were procured in Arkansas by two traveling representatives, both domiciled in Tennessee, subject to approval at the home office in Tennessee. If approved, the merchandise ordered was shipped f. o. b. Memphis, Tennessee, title being relinquished upon delivery to the common carrier. The Supreme Court of Arkansas ruled that the Arkansas gross receipts tax, which it regarded as a retail sales tax, did not apply under such circumstances. The court distinguished these facts from those in the decision of the Supreme Court of the United States, in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, (The Corporation Journal, March, 1940, page 135), noting that in that case the company maintained a sales office in the taxing jurisdiction, took contracts and made actual delivery there, whereas these circumstances were not present in the facts before the court, since here the offices were maintained in Tennessee, the sale was made there and the delivery was consummated "either in Tennessee or in interstate commerce, with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey. The rule still obtains in cases of this type, delivery to the carrier is delivery to consignee." *McLeod, Commissioner of Revenues v. J. E. Dilworth Company et al.*,\* Supreme Court of Arkansas, April 26, 1943. Commerce Clearing House Court Decisions Requisition No. 302705. Leffel Gentry, attorney for appellant. Bradley & Patten, J. Fred Brown and Daggett & Daggett, attorneys for appellee.

\* The full text of this opinion is printed in *The Corporation Tax Service*, Arkansas, page 7793.

**Federal.**

Corporate existence not disregarded, for Federal Income Tax purposes, where company was created to act for sole stockholder. In *Commissioner of Internal Revenue v. Moline Properties, Inc.*, 131 F. 2d 388, (The Corporation Journal, May, 1943, page 398), the United States Circuit Court of Appeals, Fifth Circuit, ruled that an individual taxpayer could not, in order to escape corporate taxes, be heard to disavow the corporate existence of a company which had been organized at the suggestion of the individual's creditors as a means of protecting investments and saving his equity in certain parcels of real estate located in Florida, title to which the individual, the sole stockholder, had transferred to the company, which had no assets other than the real estate. The question raised concerned whether the corporate existence was to be disregarded in taxing, for Federal income tax purposes, the gains from the sales of the property of the corporation, the court holding that the gains were taxable to the company. This judgment has been affirmed by the Supreme Court of the United States, which also refused to disregard the separate entity of the corporation for tax purposes. *Moline Properties, Inc. v. Commissioner of Internal Revenue*,\* 63 S. Ct. 1132. Commerce Clearing House Court Decisions Requisition No. 303743. Nelson Trotman of Chicago, Ill., for petitioner. J. Louis Monarch of Washington, D. C., for respondent.

\* The full text of this opinion is printed in the **CCH Standard Federal Tax Service—1943—**¶ 9464.

**Illinois.**

Retailers' Occupation Tax Act held not applicable to the mere solicitation of orders in state, whether through manufacturers' agents, sales agents, employees or soliciting offices in state. The Illinois Supreme Court has ruled that a Michigan corporation, not authorized to do business as a foreign corporation in Illinois, which had no office, store, warehouse or bank account in the state and sold its product to residents of Illinois for use and consumption and not for resale, effecting such sales through "manufacturers representatives" and shipping the goods f. o. b. Detroit, after acceptance of the order there, was not engaged in the business of selling tangible personal property at retail in Illinois. A decree of the Circuit Court dismissing the complaint in a suit seeking recovery of taxes paid under protest was reversed. *Ex-Cell-O Corporation v. McKibbin*,\* Illinois Supreme Court, May 20, 1943. A similar conclusion was reached by the Illinois Supreme Court on the same day in opinions involving other companies which solicited orders under like circumstances through solicitation of employees of corporate sales agents or through solicitation carried on by the company's own employees (*Ayrshire Patoka Collieries Corp. et al. v. Nudelman et al.*, and *Knox Consolidated Coal Corp. et al. v. Nudelman et al.*,\*) and in an opinion concerning a foreign corporation which maintained two offices in Illinois, where it employed persons to solicit orders. "The statute," observed the court, "does not authorize the imposition of a tax upon the


occupation of soliciting orders and that was the only business plaintiff was engaged in within the state." *Allis-Chalmers Manufacturing Company v. Wright et al.*,\* Illinois Supreme Court, May 20, 1943. (Note: S. B. No. 512, L. 1943, approved and effective July 12, 1943, after the above mentioned decisions were rendered, which broadened the scope of the tax to include sales effected through the solicitation of orders by salesmen in Illinois, should be given consideration in connection with these decisions.)

\* The full text of these opinions is printed in **The Corporation Tax Service**, Illinois, pages 6641, 6643 and 6645, respectively.

### Iowa.

State Supreme Court affirms County District Court in holding use tax applicable to unlicensed foreign corporation merely soliciting orders in state through traveling salesmen, followed by shipment of goods into state in interstate commerce. In *State Tax Commission v. General Trading Company*, decided December 30, 1942, (The Corporation Journal, April, 1943, page 380), the District Court of Iowa, Polk County, ruled that an unlicensed Minnesota corporation, merely having traveling salesmen, but no office, in Iowa, who obtained orders, subject to acceptance in Minnesota, which were filled by the shipment of goods into Iowa in interstate commerce, was required to collect the Iowa use tax on such merchandise. Upon appeal, the Iowa Supreme Court has affirmed the District Court, concluding also that the defendant company was a retailer subject to the act which applied to "any retailer maintaining a place of business in this state" and included in this classification any retailer having within the state, any agent operating within the state under the authority of the retailer, irrespective of whether such agent was located there permanently or temporarily, or whether such agent was admitted to do business within the state. *State Tax Commission v. General Trading Company*,\* Iowa Supreme Court, July 27, 1943. Commerce Clearing House Court Decisions Requisition No. 307584. O'Brien, Horn, Stringer & Seymour of St. Paul, Minn., and Gamble, Read, Howland & Rosenfeld of Des Moines, Iowa, for appellant. John M. Rankin, Attorney General, and Jens Grothe, Assistant Attorney General, for appellee.

\* The full text of this opinion is printed in **The Corporation Tax Service**, Iowa, page 6259.



## Appealed to The Supreme Court

The following cases previously digested in The Corporation Journal have been appealed to The Supreme Court of the United States.\*

### October 1942 Term

FEDERAL. Docket No. 660. *Moline Properties, Inc. v. Commissioner of Internal Revenue*, 131 F. 2d 388. (The Corporation Journal, May, 1943, page 398.) Federal income tax—taxation of corporation which was created to act as agent of sole stockholder—estoppel to assert that corporate entity should be disregarded. Petition for certiorari filed, January 18, 1943. Certiorari granted, March 8, 1943. Argument commenced, April 16, 1943. Argument concluded, April 19, 1943. Affirmed, June 1, 1943. (See page 17.)

UTAH. Docket No. 951. *Merrion et al. v. Scorup-Somerville Cattle Co. et al.*, 134 F. 2d 473. (The Corporation Journal, October, 1943, page 10.) Authority to sell property of corporation—notice to stockholders of special meeting. Petition for certiorari filed, April 23, 1943. Certiorari denied, June 1, 1943.

### October 1943 Term

KENTUCKY. Docket No. 154. *Anderson National Bank et al. v. Reeves*, — Ky. —. (The Corporation Journal, October, 1943, page 9.) Validity of Kentucky Escheat Act of 1940. Appeal filed, July 12, 1943.

MINNESOTA. Docket No. 33. *Northwest Airlines, Inc. v. State of Minnesota*, 7 N. W. 2d 691. (The Corporation Journal, March, 1943, page 351.) State taxation—assessment of Minnesota personal property tax against entire fleet of airplanes operated by Minnesota corporation in interstate commerce. Petition for certiorari filed, April 2, 1943. Certiorari granted, May 10, 1943.

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\* Data compiled from CCH U. S. Supreme Court Service, 1943-1944.



## Regulations and Rulings

**CALIFORNIA**—The State Board of Equalization has issued Sales Tax Ruling No. 80, providing that a retailer who resells tangible personal property before making any use thereof (other than retention, demonstration or display while holding it for resale in the regular course of business) may take a deduction for the purchase price of the property if, with respect to its purchase, he has reimbursed his vendor for the sales tax or has paid the use tax. The ruling outlines circumstances under which the deduction may be taken. (California CT (Corporation Tax) Service, ¶ 64-088.)

**COLORADO**—The Department of Revenue has ruled that a domestic corporation with its office and manufacturing plant within the State is liable for the income tax on its entire income notwithstanding that 75% of its sales are made for shipment outside of Colorado. Since all of the corporation's property was located in Colorado and it had no office outside of the State, the mere fact that goods sold by the corporation were to be shipped in interstate commerce does not give its business or income any out-of-state situs. (Colorado CT, ¶ 16-073.)

**KENTUCKY**—A foreign corporation employing a Kentucky corporation to service notes and mortgages which it owns on Kentucky real estate while retaining ownership of such paper, is doing business in Kentucky. (Opinion, Attorney General, Kentucky CT, ¶ 413.)

**MISSOURI**—The statutes prohibit the examination of income tax returns or records for the purpose of obtaining information in connection with the collection of the sales tax. (Opinion of the Attorney General, Missouri CT, ¶ 11-009.)

**NEW YORK CITY**—The City Controller has, within the past few months completely revised the Gross Receipts Tax Rules and Regulations. (New York CT, ¶¶ 124-501—124-523.)

**OREGON**—The State Tax Commission has temporarily reduced the rate of the corporation excise (income) tax from 8% to 2%, the reduced rate being applicable to the calendar year 1943 and to fiscal years beginning in 1943. The new rate will affect calendar year returns due April 1, 1944 and fiscal year returns due after that date to and including March 1, 1945. A discount of 75% has likewise been allowed on personal income taxes, also applicable to the calendar year 1943 and to fiscal years beginning in 1943, affecting returns due April 15, 1944 to March 15, 1945. (Oregon CT, ¶¶ 10-201.01, 15-201.02.)

**TEXAS**—A corporation doing a wholesale business, selling its product to independent dealers which does not own, manage or control the business of such independent dealers, but has printed catalogs issued over the dealers' names which are sold to the dealer with the privilege of furnishing such catalogs to his customers who may order merchandise therefrom, is not subject to the Chain Store Tax Law. (Opinion of the Attorney General to the Comptroller of Public Accounts, Texas CT, ¶ 48-503.)

**WISCONSIN**—The Wisconsin Board of Tax Appeals has published a volume of selected decisions and orders of the Board of wide general interest, to be referred to as 1 WBTA.

## Some Important Matters for October and November

This Calendar does not purport to be a *complete* calendar of all matters requiring attention by corporations in any given state. It is a condensed calendar of the more important requirements covered by the *State Report and Tax Bulletins* of The Corporation Trust Company. Attorneys interested in being furnished with timely and complete information regarding *all* state requirements in any one or more states, including information regarding forms, practices and rulings, may obtain details from any office of The Corporation Trust Company or C T Corporation System.

**CALIFORNIA**—Quarterly Retail Sales Tax Return and Payment due on or before October 15.—Domestic and Foreign Corporations.

**DELAWARE**—Returns of Withholding at the source due on or before October 31.—Domestic and Foreign Corporations making payments for personal services to Delaware residents and non-residents.

**GEORGIA**—Certified Statement for Registration due on or before November 1.—Domestic and Foreign Corporations.

**INDIANA**—Quarterly Gross Income Tax Return and Payment due on or before October 31.—Domestic and Foreign Corporations.

**IOWA**—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

**LOUISIANA**—Franchise Tax Report and Tax due on or before October 1.—Domestic and Foreign Corporations.

**MASSACHUSETTS**—Second instalment of Excise Tax due on or before October 20.—Domestic and Foreign Corporations.

**MINNESOTA**—Returns of Withholding at the source due on or before October 15.—Domestic and Foreign Corporations.

**NEW YORK**—Second instalment of Income Tax of Business Corporations due on or before November 15.—Domestic and Foreign Business Corporations other than real estate and holding companies.

Supplementary Franchise Tax Return (Form 60 CT) due on or before November 30.—Domestic and Foreign Business Corporations organized or qualified between May 15 and November 1 of current year.

**NORTH DAKOTA**—Quarterly Retail Sales Tax Return and Payment due on or before October 20.—Domestic and Foreign Corporations.

**RHODE ISLAND**—Semi-Annual Report to Division of Industrial Inspection during October and April.—Domestic and Foreign Corporations employing five or more persons in Rhode Island.

**UNITED STATES**—Withholding at source due on or before October 31.—Domestic and Foreign Corporations.

**WEST VIRGINIA**—Quarterly Business and Occupation (Gross Sales) Tax Return and Payment due on or before October 30.—Domestic and Foreign Corporations.

## The Corporation Trust Company's Supplementary Literature

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